

28.1381(A)(2)

[Driving/Actual Physical Control] With An Alcohol Concentration Of [0.10][0.08] Or More Within Two Hours Of Driving

The crime of [driving/actual physical control] with an alcohol concentration of [0.10][0.08] or more within two hours of driving requires the proof of the following:

1. The defendant [drove/was in actual physical control of] a vehicle in this state; and
2. The defendant had an alcohol concentration of [0.10][0.08] or more within two hours of [driving/being in actual physical control of] the vehicle; and
3. [The alcohol concentration resulted from alcohol consumed either before or while [driving/being in actual physical control of] the vehicle.]

SOURCE: A.R.S. § 28-1381(A)(2) (statutory language as of September 1, 2001). The effective date for the 0.08 legislation is September 1, 2001.

USE NOTE: Use language in brackets as appropriate to the facts.

Under the influence offenses can be committed while driving or while in actual physical control of a vehicle. Use the [driving/actual physical control] choices in brackets as appropriate to the facts. If there is only evidence of driving, do not include actual physical control in the instruction. If there is no issue of driving, do not refer to driving in the instruction. In some cases there may be issues of actual physical control and circumstantial evidence of driving. In those cases, the jury instruction should include both choices. See *State ex rel O'Neill v. Brown (Juan-Pascal, real party in interest)*, 182 Ariz. 525, 898 P.2d 474 (1995) (police observed cloud of dust in field and then found defendant holding the keys and seated in the stopped car).

If “actual physical control” is an issue, see the definition of that term at Instruction 28.1381(A)(1)-APC.

The third element must be given for an alleged offense occurring on or after July 18, 2000[September 1, 2001], when applicable legislation became effective. The State must prove that the driver was 0.10[0.08] or more within two hours based upon alcohol consumed at or prior to driving or actual physical control. If there was drinking after the defendant’s driving or being actual physical control, it could not be considered in determining whether the driver was 0.10[0.08] or above at the time of driving or being in actual physical control.
